No. 94-8729

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TINA B. BENNIS,
Petitioner,
v.
STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,
Respondent.

On Writ of Certiorari to the
Michigan Supreme Court

BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS AND RESPONSIBILITIES, THE ALLIANCE FOR A SAFER, GREATER DETROIT, THE ELEVENTH PRECINCT POLICE-COMMUNITY RELATIONS COUNCIL, AND THE COMMUNITY ANTI-DRUG COALITIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROBERT THE
General Counsel
AMERICAN ALLIANCE
FOR RIGHTS &
RESPONSIBILITIES
1144 19th Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 785-7844

RICHARD K. WILLARD *
MARVIN H. LEFF
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record
for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*

The American Alliance for Rights & Responsibilities ("AARR") is a national nonprofit organization dedicated to improving civic and community life and the public spaces that support it.[1] The AARR has had extensive

[1] The AARR's Board of Directors includes the President of the ABC Television Network (of ABC/Capital Cities, Inc.), the General Counsel of Connecticut Mutual Life Insurance Company, a past President of Stanford University, a former Assistant Attorney General, and a past President of the American Bar Association.

experience assisting community groups in closing down local drug hubs and eradicating open-air drug and prostitution markets. The AARR, for instance, has provided legal and technical assistance to public housing tenants and managers in combating drug markets and other street-level problems. It also has conducted training sessions for anti-crime groups.

The AARR has actively promoted and defended a variety of measures designed to improve the quality of urban life. For instance, the AARR helped draft the anti-aggressive-solicitation measures that are currently in place in Washington, Baltimore, Berkeley, Cincinnati, Santa Cruz, and Long Beach. The AARR has defended similar ordinances in court and has published numerous articles on this subject in the legal literature and the mainstream press, including the leading law review article on the history and constitutionality of panhandling controls, and opinion-editorials appearing in *USA Today*, *The Washington Post*, *The ABA Journal*, *The Sacramento Bee*, and *The Dallas Morning News*. The AARR also has defended anti-drug loitering ordinances, drug-related evictions and security searches in public housing, regulations on urban camping, and service learning requirements and tailored drug-testing programs in public schools. Throughout these efforts, the AARR has emphasized the importance to communities of safe, welcoming, and civil public spaces, while challenging extreme assertions of rights that block community progress.

The AARR has advocated the increased utilization of civil remedies, including seizures, in its speeches, workshops, and technical assistance. The AARR highlighted the effectiveness of seizures, particularly of automobiles, in *The Winnable War: A Community Guide to Eradicating Street Drug Markets*, which has been used by over 14,000 grass-roots groups nationwide and praised by editorial writers, government officials, and drug experts. In *The Winnable War*, the AARR discussed how seizures

focus on the demand side of drug markets by compelling families to confront the harmful results of their drug habits, and by forcing customers rather than hosting neighborhoods to pay the penalty for illicit activities. It stated, "[S]eizures can have a deeply chilling effect on drug sales across an entire city, especially among suburban drug buyers who travel to the city to make their drug purchases." *The Winnable War*, at 55.[2] These same principles apply to open-air prostitution markets, which rely on customers who drive into deteriorating neighborhoods solely to solicit illegal services.

Joining AARR in support of the Respondent are: The Alliance for a Safer, Greater Detroit ("The Alliance"); The Eleventh Precinct Police-Community Relations Council ("the Council"); and the Community Anti-Drug Coalitions of America ("CADCA").

The Alliance strives to reduce crime and the fear of crime in Greater Detroit and to improve the image of Detroit and its environs as a safe place for residents, visitors and businesses. Toward this end, The Alliance fosters communication and cooperation between neighborhoods, the business community, and the justice system. One specific goal of The Alliance is to reduce drug trafficking and violent crime through the systematic identification and apprehension of those involved in such activities.

Similarly, CADCA's mission is to be a membership organization that promotes and facilitates comprehensive responses to the nation's problems of drugs and violence. CADCA is a national association for community coalitions. It grew out of the National Office of Drug Control Policy in recognition that coalitions are effective in combating drugs and violence. Coalition programs are effec-

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[2] Forfeitures and seizures were also highlighted as useful in *A Civil War*, an AARR-sponsored guide to civil remedies against flagrant drug markets, which was drafted by Cadwalader, Wickersham & Taft.

tive because they are developed within the community—community solutions for community problems.

The Council is a grass roots community association of volunteers living in the same neighborhood where Mr. Bennis engaged in illicit sexual activity. These residents have suffered direct harm caused by the open-air prostitution market that Wayne County is trying to shut down.

The *amici* fully recognize that the threat of vehicle forfeitures remains an important deterrent to drug and prostitution activity. Since 1988, when the Wayne County Prosecutor began relying on the statute at issue to seek forfeiture of vehicles involved in drug and prostitution activity, the Detroit neighborhoods—which were suffering in desperation from the destructive effects of drug and prostitution markets—have finally begun to see some relief. In May 1995 alone, Detroit police seized 221 cars used to facilitate prostitution. Over 65% of these cars were licensed to nonresidents of the impacted neighborhoods. The variety of out-of-state license plates, coming from across the Midwest and Canada, demonstrates that attempts to curb illicit drug and prostitution markets must reach beyond the providers and address the demand side of the problem.

The *amici* view the Petitioner's constitutional challenge to the Wayne County program as an attempt to use the courts to prevent a measured and effective public safety initiative. The Wayne County program is a balanced and innovative way to deter community-destroying prostitution markets. The program places burdens on those who impose on other communities, while it avoids expensive and unnecessary incarceration. The *amici* believe it is fair to address drug and prostitution markets by focusing on the demand side of the equation, and, based on research, the *amici* have concluded that programs such as Wayne County's are useful in re-establishing communities as fit places to live, work, recreate, and raise families.

STATEMENT OF THE CASE

This case arises out of a community's efforts to stop the cumulative and harmful effects of prostitution and illicit drug use on its neighborhoods. The question presented to the Court is whether a state civil statute focusing on all potentially responsible parties for a public nuisance violates the Fifth and Fourteenth Amendments of the Constitution. The statute at issue allows communities to abate a public nuisance, such as property intimately involved in illegal activity, by forfeiture. Such abatement may encompass the property interests of uninvolved co-owners of the targeted nuisance. These co-owners are uninvolved to the extent their own conduct is not tied to the proscribed use of the property by direct participation or explicit permission.

One day in 1988, the Petitioner's husband, John Bennis, drove his car into a Detroit neighborhood and picked up a passenger standing on the corner.[3] The passenger, Kathy Polarchio, earlier had been seen flagging down passing vehicles. Mr. Bennis and Ms. Polarchio were followed by Detroit police officers and later found engaged in an illicit sexual act—while still in the Bennis car, in plain view on a public street. Petitioner's husband was arrested and later convicted for gross indecency. A suit also was brought by the county prosecutor alleging that the Bennis car was a nuisance subject to abatement by forfeiture.[4]

The hearing on the nuisance complaint was an equitable proceeding. The Petitioner asserted that she had no knowledge that her husband used their car to engage in illicit conduct and contended that her property interest should not be forfeited. The judge, however, addressed a number of factors before concluding that Mrs. Bennis'

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[3] One witness at the nuisance abatement proceeding testified that he had seen the Bennis vehicle in the neighborhood before.

[4] *See* Michigan Compiled Laws Annotated, § 600.3801-3835.

interest could be extinguished by forfeiture. He addressed the acts giving rise to the public nuisance. He considered the fact that the family readily had available other transportation, i.e. a second car. The judge also considered the value of the car (an 11-year-old Pontiac) and the fact that little if any money would be available for distribution after deducting the costs of seizure and sale of the vehicle.

The Michigan Court of Appeals reversed the lower court's decision on interpretation of the statute. The Michigan Supreme Court then reversed the judgment of the appellate court. The state supreme court also rejected Petitioner's arguments that the statute, both facially and as applied to her, violated provisions of the federal Constitution. Specifically, forfeiture of her property interest in the car did not violate the Takings Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

The Constitution undoubtedly permits states to enact laws providing for the forfeiture of property intimately involved in an owner's criminal activity. Thus, for example, an owner who uses his boat or automobile for drug trafficking or prostitution may properly have his ownership interest in that property extinguished. The instant litigation concerns the interest of a co-owner in property used for criminal activity.

The Respondent has a legitimate interest in deterring crime and using forfeiture to address property intimately involved in certain illegal activity. To the extent incidental effects and burdens are placed on uninvolved co-owners of the targeted property, the state has a further legitimate interest in structuring those consequences to induce cooperation in stopping the deterioration of its neighborhoods. And subjecting the property interests of these co-owners to possible forfeiture is reasonably related to the state's legitimate interests.

Admittedly, the Michigan statute affects and burdens the uninvolved co-owner of certain property, the illicit use of which constitutes a nuisance under state law. The primary goal of the statute is to deter illegal activity. One incidental effect is that Mrs. Bennis' property interest in the car, like her husband's interest, was subject to possible forfeiture. The incidental burden on Mrs. Bennis, and other uninvolved co-owners, is that she now must take a more active approach to how her property is used, to protect the community and to preclude her future exposure to forfeiture.

These effects and burdens on the uninvolved co-owner do not violate the Takings and Due Process Clauses of the Constitution. There are existing protections for the truly "innocent" co-owner whose vigilance could not have stopped the illegal usage. One such protection is the equitable power of the courts to consider the factors that shape each individual case of forfeiture. Other protections arise from the federal Constitution and have been developed through the Court's forfeiture jurisprudence.

The Court should not prohibit states from developing laws, consistent with the Court's jurisprudence, to address the serious problems communities are facing today. One tool communities are using to address neighborhood deterioration is civil forfeiture. The pedigree of civil forfeiture is well documented in our legal history. Yet, its use admittedly raises difficult questions concerning individual responsibility, equity, and property rights. These issues are best resolved through the legislature and judicial processes of the states, rather than the elaboration of new federal constitutional doctrines.

In this case, Petitioner is arguing for a curious amalgam of state and federal law that would make it very difficult to use civil forfeiture for property jointly owned by a husband and wife. Petitioner argues that the doctrine of negligent entrustment should define her exposure to civil forfeiture. She contends that she could not have legally

barred her husband from driving the car and thus that her property interest in the car is effectively immune from forfeiture. The Court should reject this effort to apply state legal doctrines out of their proper context, in the guise of constitutional adjudication.

ARGUMENT

I. THE STATE HAS A LEGITIMATE INTEREST IN PROTECTING ITS COMMUNITIES FROM THE IMPACT OF PROPERTY USED TO FACILITATE CRIMINAL CONDUCT.

The state of Michigan has a legitimate interest in focusing on property intimately involved in certain crimes. Neighborhood integrity is severely threatened if communities cannot address the supply and *demand* sides of prostitution and illicit drug use. Depriving individuals such as Mr. Bennis of the primary vehicle, figuratively and literally, for their unlawful conduct is a viable option for communities addressing the demand side of this conduct. Burdening the property interest of co-owners of the vehicle, with possible forfeiture of that interest, is rationally related to this goal.[5]

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[5] The Mayor of Chicago, Richard Daley, once commented on the intimate relationship between a car, a "john" or customer, and prostitution. In addressing a proposed ordinance to seize the cars of certain motorists, he stated,

> When someone commits a crime and you take their car—oh, my God, it's like taking their home.
>
> It's amazing. Americans have a love relationship with a car . . . You can put them in jail, but when you take their car, it'll have a dramatic impact on communities that have prostitution.

See Fran Spielman, *Council Cracks Down on 2 Street Menaces*, Chicago Sun-Times, July 30, 1992, News at 4.

Although the instant litigation deals with an automobile used for an act of gross indecency, cars are intimately involved with neighborhood deterioration in other ways. For example, they are used for the distribution of controlled substances. More importantly, an automobile's connection to ill-gotten wealth and prestige can have a significantly negative impact on children. U.S. District Court Judge Blanche Manning once commented, "The only role models these kids have are their teachers. But when they leave school, their role models are the young men committing crimes and driving big, beautiful cars around until they get arrested." *See* Patricia Callahan, *Judges Give 'Adopted' CHA Building Reprieve From Neglect, Hopelessness*, Chicago Tribune, December 28, 1994, Chicagoland at 2.

In its forfeiture jurisprudence, the Court has recognized the intimate relationship an object can have to certain crimes. In *United States* v. *The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844), the Court addressed forfeiture of a ship due to the acts of primarily one individual. The captain had engaged in piratical conduct prohibited by a federal statute. The owners of the ship contested its forfeiture insofar as they had no knowledge of how their ship would be used. The Court, nevertheless, held that the "innocence" of the owners could not "withdraw the ship from the penalty of confiscation under the act of Congress." *Id.* at 232-33.

The Court in *Brig Malek Adhel* did not use the ship as a conduit for punishing the chiefly culpable individual. The captain apparently had been punished. And there were no issues of personal jurisdiction which shaped the Court's decision. Yet, the Court still upheld the forfeiture of the ship. The rationale seems to have rested on the intimate relationship between the prohibited conduct and the vessel. The Court states, "And this [condemnation of the ship] is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong . . ." *Id.* at 233. Without the ship, there could be no piracy.

The forfeited car underlying the instant litigation was intimately related to the offense punished. Mr. Bennis could not have found other means of transportation adequate for acquiring Ms. Polarchio's services. The car was uniquely necessary both for getting to the prostitution

market and in "hosting" the illicit sexual act. The state should be allowed to focus on both the individual engaged in the illicit conduct and the vehicle which facilitated that conduct.

Subjecting a Co-Owner's Property Interest in an Abatable Nuisance to Possible Forfeiture Is Reasonably Related to the Legitimate Interest.

The incidental burdens placed on co-owners of vehicles creating an abatable nuisance are a reasonable consequence of the statutory scheme. The fact that Mrs. Bennis was a named defendant in the civil suit for forfeiture does not change the nature of her burden. When the state moved against the Petitioner's husband and the instrument of his conduct, the Petitioner's property interests necessarily were at issue. However, the state should not be precluded from abating a public nuisance simply because its actions may have negative consequences on other individuals.

Insofar as co-owners are induced to pay more attention to the use of their property, the Michigan statute is reasonably related to the state's legitimate interests. The possible forfeiture of property interests in co-owned property builds a partnership between co-owners and communities in the effort to preserve neighborhood integrity. A state's aim in producing this effect should not be considered illegitimate or arbitrary. The Court has stated that using forfeiture to fashion owners into a "secondary defense" against a proscribed use of property is "within the limits of due process." [6]

[6] *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926).

II. THE UNINVOLVED CO-OWNER IS PROTECTED BY SUBSTANTIVE CHECKS ON THE STATE'S USE OF CIVIL FORFEITURE.

A. There Are Existing Federal Constitutional Protections for Co-Owners of Property Subject to Forfeiture.

Specific provisions of the federal Constitution already constrain a state's use of civil forfeiture proceedings. In *Austin v. United States*, 509 U.S. ——, 113 S.Ct. 2801 (1993), the Court held that the Eighth Amendment's prohibition against excessive fines applied to civil forfeitures under a federal statute. Petitioner's property interests then were protected by the Eighth Amendment. The state court, for example, could not have forfeited her interest in the family's second car, left parked in the garage. However, the Court in *Austin* did not rule that the property interests of an uninvolved owner always should be compensated. Rather, the Court declined to create a formula for applying the Eighth Amendment.[7] No Eighth Amendment challenge has been raised in this case.

The Constitution also requires fair procedures for forfeiture. For example, in *United States v. Good Real Property*, 510 U.S. ——, 114 S.Ct. 492 (1993), the Court applied the Fifth Amendment's procedural due process analysis to *ex parte* seizures under a federal, civil forfeiture statute.[8] The Court ruled that,

> Unless exigent circumstances are present, the Due Process Clause requires the Government to afford

[7] Justice Scalia's concurrence, however, offers a line of inquiry courts might use. He focuses on the relationship of the seized property to the underlying offense, as opposed to focusing on the value of the property. *See Austin*, 113 S.Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment).

[8] Although the seizure was under a federal and not state statute, it is assumed that the holding in *Good Real Property* applies to states through the Fourteenth Amendment.

> notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.

Id. at 509 (citation omitted).

Finally, the Equal Protection Clause of the Fourteenth Amendment may confine use of civil forfeiture statutes in two distinct ways. First, the states cannot apply their police power behind civil forfeiture in a discriminatory manner. The Petitioner does not argue that Michigan has discriminated against her by using its nuisance abatement efforts to protect only certain communities. Second, the Equal Protection Clause mandates that the state have a legitimate interest in subjecting the property interests of uninvolved co-owners to possible forfeiture. The Petitioner does not argue that uninvolved co-owners of an abatable nuisance constitute a protected class requiring more than rational basis protection.[9]

B. Equitable Powers of the Courts Are a Significant Check on the Potentially Harsh Effects of Civil Forfeiture.

The instant litigation provides a clear example of the significant protection afforded uninvolved co-owners by the equitable powers of the Michigan courts. The Michigan trial court, during the nuisance proceeding, openly and carefully addressed the equities involved in forfeiting Mrs. Bennis' interest in the car.[10] The Michigan Supreme Court further clarified,

> It is not contested that this is an equitable action. That being the case, it is critical to recognize that the trial judge considered alternatives on the record and, in the exercise of his discretion, fashioned an appropriate remedy, abating the entire interest in the vehicle.

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[9] Notably, equal protection analysis can be identical to due process analysis.

[10] Transcript of the hearing held on November 2, 1988, at 188-89 and 193.

Michigan ex rel. Prosecutor v. Bennis, 447 Mich. 719, 742 (1994). Mrs. Bennis' interests did not go unaddressed and unprotected. Protecting such interests, however, should not mean the state cannot abate a public nuisance or, alternatively, the state must compensate co-owners in every instance.

The Court's forfeiture decisions confirm that a decision-maker's discretion, in weighing the equities of a case, can be sufficient protection for innocent claimants. In *United States v. One Ford Coach*, 307 U.S. 219 (1939), the Court addressed the harsh consequences made possible by literal interpretation of a federal forfeiture statute. At issue was the scope of investigation a creditor had to demonstrate to mitigate forfeiture of its interest in an automobile seized because of its unlawful use. In analyzing the statutory history, the Court referenced an innocent claimant's recourse to the discretion of the Secretary of the Treasury or the Attorney General in seeking mitigation. This recourse was a "clear remedy" for such claimants. *Id.* at 236.[11]

The Michigan court's ability and concern to weigh the equities in the forfeiture proceeding protected the Petitioner's interest more than the discretion referenced in *One Ford Coach*. The judiciary has no vested interest in the decision-making process determining whose property will be seized. In contrast, an official from the executive branch might be less objective.

Furthermore, it is the equitable power of the courts that protects a truly innocent co-owner from having to forfeit her interest by virtue of her status alone.[12] All

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[11] *Cf. United States v. United States Coin & Currency*, 401 U.S. 714, 721 (1971) (Secretary of the Treasury's discretion is referenced with the implication that it protects innocent claimants).

[12] In *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512-13 (1921), the Court states, "There may, indeed, be greater risk to the owner of property in one form or purpose of its bailment than

uninvolved co-owners of property creating a public nuisance will not have their interest forfeited. Rather, due to the relationship such co-owners have to the property and to the people who create the nuisance, these uninvolved co-owners *might* have their interest forfeited. The courts will have the facts of each case to decide the issue.

C. The Protection Afforded by the Political Process in This Case's Legal Context Should Not Be Readily Dismissed.

The state's political process should not be overlooked as substantial protection for the uninvolved co-owner of property subject to forfeiture. While the age of the Michigan statute at issue evidences the strong tradition of civil forfeiture in our legal history,[13] the statute is still a product of legislative deliberation. Consequently, the voters in Michigan have unhindered and significant recourse to the voting booth to determine how competing interests are balanced in the context of civil forfeiture.

The fact that similar statutes are being questioned and in some cases changed, in fora other than the federal Constitution, further suggests that the Court should not rule for the Petitioner. Rather, the Court should allow the electorate in Michigan and other states to engage in more legislative dialogue. The *Amicus* brief of the American Bankers Association states that a current draft of the model Uniform Controlled Substances Act contains an "innocent owner" defense.[14] Such proposed legislation may offer broad protection for certain categories of owners. Yet, while states should be free to adopt such

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in another, but wrong cannot be imputed to him by reason of the form or purpose."

[13] The statute was enacted in 1915 and amended ten years later. *See Bennis*, 447 Mich. at 759 (Levin, J., dissenting).

[14] Brief of the *Amicus Curiae* American Bankers Association in Support of Petitioner at 8.

proposed statutes, the Court should not mandate their adoption in whole or in part. The federalist form of government created by our Constitution militates against forcing Michigan to follow suit if it chooses not to.[15]

III. PETITIONER'S CONSTITUTIONAL CHALLENGES TO THE STATUTE ARE WITHOUT MERIT.

A. Forfeiting the Property Interest of Uninvolved Co-Owners Does Not Violate the Takings Clause of the Fifth Amendment.

Property owners always have held their interest subject to the state's police power to address criminal activity. Civil forfeiture was a well-entrenched doctrine in property law prior to ratification of the Fifth Amendment. In *The Common Law*, Justice Holmes addresses the history of the liability of inanimate objects. He states,

> "Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner." That is from a book written in the reign of Henry VIII., about 1530.

Oliver Wendell Holmes, Jr., *The Common Law* 25 (Little, Brown and Company 1923) (1881) (citations omitted).

The Court long has recognized the deep historical roots of forfeiture. *In Brig Malek Adhel*,[16] the Court interpreted a federal statute enacted in 1819, that allowed the forfeiture of ships intimately involved in piracy or piratical

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[15] The American Bankers Association's brief also references federal legislation, on civil asset forfeiture, solicitous of innocent owners. *Id.* at 11. However, in the context of statutory forfeitures, the Court already has stated that the validity of a state statute is not contingent upon narrower federal statutes. *See Van Oster*, 272 U.S. at 468.

[16] 43 U.S. (2 How.) 210 (1844).

aggression.[17] The Court held that because the statute made no exception for violations done without the owner's cooperation, the innocence of the owner could not preclude forfeiture. More recently, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the Court referenced the long history of forfeiture statutes in our legal tradition. This history rarely has entailed the ability of property owners to impede forfeiture on the basis of innocence. Justice Brennan, in *Calero-Toledo*, writes:

> But "[l]ong before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of the Confederation—were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes" . . .
>
> The enactment of forfeiture statutes has not abated; contemporary federal and state forfeiture statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise.
>
> Despite this proliferation of forfeiture enactments, the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.

Id. at 683 (citations omitted) (internal brackets in the original).

The above-referenced history clarifies that Takings jurisprudence has entailed the state's power to abate, by forfeiture, nuisances without compensating property owners. The bundle of sticks constituting an individual's property is created by state law. That bundle has never mandated compensation when an uninvolved owner's interest was extinguished in abatement of a public nuisance. By contrast, the bundle always has been qualified by the

[17] In fact, "Federal forfeiture legislation in the United States can be traced back to the first session of Congress." Terrance G. Reed, Article: *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 256 (1994) (citing legislation enacted on July 31, 1789).

doctrine of *sic utere tuo ut alienum non laedas*.[18] The Michigan statute subjecting the Bennis car to possible forfeiture is an outgrowth of this doctrine. Consequently, the Court's reasoning in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), is particularly applicable to the Respondent's position. Civil forfeiture has long been a "background principle[] of the State's law of property and nuisance already place[d] upon . . . ownership." *Id.* at 2900.

In *Calero-Toledo*, the Court specifically upheld the forfeiture of a yacht against a Fifth Amendment, Takings Clause challenge.[19] A lessee of the vessel had violated a Puerto Rico statute regarding use of controlled substances. The yacht was seized and subject to forfeiture. The lessor-owner challenged the forfeiture arguing, *inter alia*, that it deprived him of property without just compensation. He asserted that his lack of knowledge and involvement in the underlying criminal enterprise was of constitutional significance. The Court held otherwise. After referencing the history of its civil forfeiture jurisprudence, the Court stated,

> Judicial inquiry into the guilt or innocence of the owner could be dispensed with . . . state lawmakers, in the exercise of the police power, were free to determine that certain uses of property were undesirable and then establish "a secondary defense against a forbidden use . . ."

Id. at 686 (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926)).

Contrary to the Petitioner's argument, *Calero-Toledo* is not distinguishable in terms of some hidden level of culpability applied to the lessor-owner. Petitioner argues that *Calero-Toledo* involved an owner innocent of only

[18] *See Black's Law Dictionary* 1380 (6th ed. 1990).

[19] 416 U.S. 663 (1974).

criminal wrongdoing.[20] The holding, under this interpretation, does not apply to owners innocent of any and all wrongdoing, including negligence. However, a close reading of the opinion belies the Petitioner's interpretation. Two justices dissented from the majority, specifically arguing that "the forfeiture of property belonging to an innocent and nonnegligent owner violates the Fifth and Fourteenth Amendments." *Id.* at 690-91.[21] The majority's reasoning then implicitly encompassed the owner's lack of negligence.[22]

B. The Power of a State to Subject a Co-Owner's Interest to Forfeiture Should Not Be Controlled by State Property Law Doctrines Taken Out of Context.

The Court's decisions already suggest that the states have substantial room statutorily to induce vigilance from uninvolved co-owners. Communities need this room to build additional deterrence to certain illegal activity. To the extent discussion of inducement and deterrence suggests a negligence standard, the duty of care is more expansive than Petitioner would concede.

Recent decisions clarify that the constitutional focus, in civil forfeiture proceedings, is on the owner's responsibility and power to deter property misuse and his exercise of that power. In *Calero-Toledo*, the Court suggests that a state can induce innocent co-owners to be more cognizant of how their property is used, where the co-owner has the means to influence that use. The Court quotes Chief Justice Marshall as stating, "[A] forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be

[20] Brief for Petitioner at 27-28.

[21] Justice Stewart and Justice Douglas argued this point.

[22] Indeed, Justice Douglas' dissent points out that "only one marihuana cigarette was found on the yacht." *Calero-Toledo*, 416 U.S. at 693 (Douglas, J., dissenting).

employed." *Calero-Toledo*, 416 U.S. at 689 (quoting *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 363 (1808)). The means to prevent illegal use of the property, for example, are not present when the property has been stolen. The Court also asks whether the owner has done all that reasonably could be expected of him or her to prevent the illegal use of the property. *Id.* Yet, an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it. As a result, the Court is willing to place a heavy burden on owners who anticipate the misuse.

In *Austin v. United States*,[23] the Court again suggests that the deterrence permissibly effected by forfeiture of an uninvolved co-owner's property interest is defined by power—even more than knowledge. Addressing its ruling in *Calero-Toledo*, the Court states, "[W]e have permitted punishment in the absence of conscious wrongdoing, so long as the defendant was not '*powerless*' to prevent or correct the violation." *Id.* at 2810 n.11 (citing *United States v. Park*, 421 U.S. 658, 673 (1975)) (emphasis added).[24]

The states' ability to create a "secondary defense" to certain criminal conduct should not be defined by the

[23] 113 S.Ct. 2801 (1993).

[24] The Court's jurisprudence on "public welfare offenses" generally supports this reasoning. In *Morissette v. United States*, 342 U.S. 246 (1952), the Court implicitly approved of a category of criminal statutes that did not require inquiry into the individual's state of mind. Such statutes created a form of strict liability in the criminal law. The Court approvingly found that they "heighten the duties of those in control of particular . . . activities that affect public health, safety or welfare." *Id.* at 254. The Court also referenced an earlier opinion by Chief Justice Taft who referred to,

> regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes.

Id. at 258-59 (quoting *United States v. Balint*, 258 U.S. 250, 252 (1922)).

strictly legal pressures an uninvolved co-owner can exert on another co-owner. Petitioner argues that a co-owner's property interest in an abatable nuisance should be subject to forfeiture only if there has been negligent entrustment. Petitioner then refers to the Restatement (Second) of Torts § 308 (1965) as defining negligent entrustment.[25] Ostensibly, this section exposes the co-owner to liability where she is able, to some extent, to control the property. However, Comment (*a*) to Section 308 defines control as the ability of the owner to demand her consent for using the property.[26] State property law in turn determines the ability of a property owner to demand her consent. Petitioner's property interest then could be forfeited only if she could have obtained an injunction against her husband for any use of their car.

Petitioner's negligent entrustment standard would not apply to many co-ownership arrangements. Specifically, the standard rarely would apply to married co-owners. A co-owner married to the other co-owner cannot demand her consent before her spouse uses their property. Under state property law, each spouse normally can use the entire property as he or she wishes, without prior consent. The negligent entrustment doctrine would effectively preclude states from subjecting much co-owned property to forfeiture.

The only difference between the Petitioner and the owner in *Calero-Toledo* is the timing of when each un-

[25] Section 308 states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

The Petitioner would modify § 308 by replacing the language "in such a manner as to create an unreasonable risk of harm to others" with "in a manner proscribed by law".

[26] *See id.* at 100, cmt. a.

involved owner decided to share her or his property with another. In *Calero-Toledo,* the decision was made after the owner obtained title. In the instant litigation, the decision to share the property was made before the owner obtained title. Nevertheless, each of the decisions triggered issues of responsibility. State civil forfeiture laws should be allowed to address an owner's responsibility for those who use her property—whether the users are lessees or co-owners.

IV. PLACING THE BURDEN OF PROVING INNOCENCE ON THE CO-OWNER DOES NOT VIOLATE PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Court's interpretation of federal statutes permitting forfeiture of property does not evidence a concern that the owner must prove her lack of knowledge or consent. For example, in *Austin* the government had to show probable cause that the subject property was put to prohibited use.[27] The burden then shifted to the property owner to show that her interest was protected.[28] In applying the Eighth Amendment's restrictions against excessive fines, no member of the Court suggested that the statute's burden allocation was unconstitutional.

The Court's lack of constitutional concern is readily defensible given the nature of civil forfeiture proceedings. The burden can be met by a preponderance of the evidence.[29]

The spousal context of the instant litigation further demonstrates why the co-owner alleging innocence should

[27] *Austin,* 113 S.Ct. at 2815 (Scalia, J., concurring in part and concurring in the judgment). The statute at issue was 21 U.S.C. § 881.

[28] *Id. See* 21 U.S.C. § 881(a)(4)(C).

[29] *Cf.* David J. Stone, *The Opportunity of* Austin v. United States: *Toward A Functional Approach to Civil Forfeiture and the Eighth Amendment,* 73 Boston U. L. Rev. 427, 432 (1993) (discussing the burden of proof under various federal statutes).

bear the burden of proof. Whatever standard, if any, the Court adopts in protecting the uninvolved owner's property interest, that owner will have better access to the evidence of innocence. Moreover, the evidentiary rules protecting the marital unit might effectively preclude the state from proving any form of negligence.[30]

Lastly, the potential for abuse inherent in a defense that can preclude or impede forfeiture suggests that the burden of proof rest with the owner. Otherwise, criminals may be encouraged to place property partly or entirely in the names of their spouses, relatives, or friends to immunize it from seizure.

CONCLUSION

Communities increasingly are facing threats to neighborhood integrity. To fight these threats various approaches are being explored that focus on both the supply and demand side of criminal conduct. While state electorates struggle to balance competing interests in exploring these approaches, the Court should not constitutionally narrow the alternatives.

The states should be allowed to induce co-owners to be mindful of community concerns. If one co-owner uses shared property as an abatable nuisance, the other co-owner should not be allowed to impede forfeiture actions against the property. Co-ownership, in some cases, involves responsibility for the actions of another. In *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877), the Court addressed the forfeiture of certain real and personal property. The lessee of the property was charged with defrauding the government. The leased property was thereby subject to forfeiture regardless of the lessor's lack of knowledge of the misconduct. The Court concluded, "[I]f the lessee abuses [the lessor's] trust, it is a matter to be settled between him and his lessor." *Id.* at 404. Likewise, when Mr. Bennis abused the trust of the Petitioner, it was proper for the State to make such misconduct a matter to be settled between Petitioner and her husband.

[30] Testimonial immunity and the marital communications privilege often apply only in criminal cases. However, courts and commentators have labeled the forfeiture proceeding "quasi criminal." *See, e.g.*, Terrance G. Reed, *Article: On The Importance of Being Civil: Constitutional Limitations On Civil: Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 261-62 (1994) (citing *Boyd v. United States*, 116 U.S. 616 (1886)). Consequently, the aforementioned spousal privileges may become a significant issue in civil forfeiture proceedings involving married co-owners.

Respectfully submitted,

ROBERT TEIR
General Counsel
AMERICAN ALLIANCE
FOR RIGHTS &
RESPONSIBILITIES
1146 19th Street, N.W.
Suite 250
Washington, D.C. 20036
(202) 785-7844

RICHARD K. WILLARD *
MARVIN H. LETT
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record
for *Amici Curiae*

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